

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

30493

FILE:

B-216353

DATE: February 22, 1985

MATTER OF:

Ed Davis Construction, Inc.

DIGEST:

1. In procurement substantially funded with Department of Housing and Urban Development financial assistance which requires compliance with federal contracting requirements as a condition of the assistance, local housing authority may waive complainant's failure to submit required bid guarantee if bid is the only eligible one received.
2. A bidder's failure to bid on an alternate deductive item which is among the items selected for award renders the bid ineligible for award.
3. Mere allegation of preferential treatment of another bidder, without evidence in record, constitutes speculation and will not satisfy the protester's burden of affirmatively proving its case.

Ed Davis Construction, Inc. complains that the Housing Authority of Kansas City, Kansas, improperly awarded a contract substantially funded by financial assistance from the Department of Housing and Urban Development (HUD) under the Comprehensive Improvement Assistance Program (CIAP). This program covers physical and management improvements to existing public housing.

Ed Davis contends that an award to Ammon & Associates in connection with 1983 CIAP modernization project No. KS1-905 was improper because (1) the awardee did not submit a bid bond at the time of bid opening and (2) negotiations were conducted in this advertised procurement. We deny the complaint.

Background

Wyandotte Towers, a housing project for the elderly, is being renovated under an agreement between the Housing Authority and HUD, which will provide a loan and annual

031281

contributions in accord with the United States Housing Act of 1937, as amended, 42 U.S.C. §§ 1437(c), 1437(l) (1982). The total amount of the loan was \$1,133,710; however, of this amount, only \$939,710 was legally available for the award of a CIAP modernization construction contract under the HUD-approved project budget.

In its invitation for bids (IFB), issued on July 19, 1984, the Housing Authority requested a base bid and alternate bids for six items. Alternates No. 1 through 5 added work, for example, removal and replacement of outdoor lighting, and alternate No. 6 removed an item of work otherwise included in the base bid. If the Housing Authority decided to accept certain alternates, the prices bid for those alternates would be added to or deducted from the base bid as appropriate. The invitation provided a separate space for submitting prices for the base item and each alternate line item.

Paragraph 9a of the Instructions to Bidders stated that the contract would be awarded to the responsible bidder submitting the lowest base bid, provided that the

" . . . base bid does not exceed the amount of funds then estimated by the Local [Housing] Authority as available for this contract. If such bid exceeds such estimated available amount, the Local [Housing] Authority may reject all bids or may award the contract on the base bid combined with such deductive [sic] alternates, applied in the numerical order in which they are listed in the Form of Bid, as produces a net amount which is within the estimated available amount. . . . The Local [Housing] Authority, however, reserves the right to reject any and all bids and to waive any informality in bids received whenever such rejection or waiver is in the interest of the Local [Housing] Authority."

The solicitation also required each bidder to submit a bid guarantee with its bid. Paragraph 3 of the Instructions required this to be of an amount not less than 5 percent of the bid and in the form of a certified check, bank draft, U.S. government bonds, or a bid bond secured by a surety company.

Two bids were submitted in response to the IFB. However, both base bids were in excess of the \$939,710 available for award. Ed Davis submitted a base bid of \$994,994, conditioned on the installation of Amana mechanical equipment, and offered prices for all but one of the alternate items. For item No. 6, which was to be deducted from the base bid, Davis entered the words "No Bid." Ammon submitted a base bid of \$1,022,984 and offered prices for each of the alternate items. Ammon also stated in its bid that if Amana equipment was acceptable, the firm would deduct \$40,000 from its base bid. However, Ammon failed to submit a bid guarantee with its bid.

Ammon's failure to supply the bid guarantee at bid opening on August 23 was waived by the Housing Authority on the ground that it had reserved the right to waive any informality if such action was determined to be in the Housing Authority's best interest. The Housing Authority determined that Ammon should be allowed a "reasonable time" to provide the guarantee.

On August 28, an architectural review determined that Amana mechanical equipment met specifications. Thus, Ammon's base bid after the deduction for Amana equipment was \$982,984, or lower than Ed Davis's. Because both base bids exceeded available funding, the Housing Authority decided to accept Ammon's base bid, minus alternate No. 6 and plus as many additive alternates, applied in the order listed in the IFB, as could be obtained with the available funds.

On August 29, Ed Davis requested that the Housing Authority accept a \$100,000 deductive bid for alternate No. 6. The Housing Authority advised the firm that this late modification could not be accepted.

On August 31, the Board of Commissioners of the Housing Authority resolved, subject to receipt of a bid bond or cashier's check from Ammon and final approval by HUD, to make award to Ammon based on its low base bid of \$982,984 and its deductive alternate No. 6 of \$94,280, combined with the least expensive of Ammon's alternate bids on additive items No. 2 and 4, in the amounts of \$23,700 and \$31,600, respectively. This totaled \$994,004, or \$4,294 over available funding.

HUD approved the award on September 11, 1984, suggesting that the Housing Authority use its operating reserve funds to make up the difference between the available federal funds and the final contract price. The Housing Authority did so and awarded to Ammon & Associates on September 18, after Ammon submitted a bid guarantee in the form of a cashier's check in the required amount. Work has since begun on the project.

Ed Davis Construction Inc.'s Complaint:

Ed Davis complains that the award to Ammon was improper because Ammon's bid was nonresponsive to the bid guarantee requirement and because negotiations were conducted with Ammon. Ed Davis further contends that the Housing Authority's action in accepting the late Ammon bid guarantee was prejudicial, particularly since its own late modification was not considered.

HUD maintains that because of the Housing Authority's decision, based on available funding, that alternate item No. 6 would be deducted from the base bid, and because Ed Davis did not submit a price for this item, Ammon submitted the only acceptable bid. Citing Hudgins & Company, Inc., 56 Comp. Gen. 43 (1976), 76-2 CPD ¶ 368, HUD argues that because only Ammon was eligible for award, the firm's failure to submit a bid guarantee at time of opening could be waived. The agency maintains that the award was fully in accord with applicable federal law and regulations.

GAO Analysis:

At the outset, we note that our Bid Protest Procedures, 4 C.F.R. Part 21 (1984), which involve direct federal procurements, do not apply per se to procurements by local housing authorities that have annual contributions contracts with HUD; the status of a local housing authority is similar to that of a federal grantee. Linde Construction--Reconsideration, B-206442.2, July 13, 1983, 83-2 CPD ¶ 85. However, until recently, we have accepted complaints concerning procurements by housing authorities and other grantees in order to ensure that contracts awarded by recipients of federal funds comply with any requirements made applicable by law, regulation, or the terms of the agreement between the federal government and the recipient

of the funds.^{1/} See Curtiss Development Co. and Shipco, Inc., 61 Comp. Gen. 85 (1981), 81-2 CPD ¶ 414, which describes the basis for our review of procurements funded in connection with annual contributions contracts.

HUD's annual contributions contracts provide that housing authorities undertaking modernization projects will comply with all HUD regulations. In this connection, HUD regulations provide that in the award of a CIAP modernization construction contract, the housing authority shall comply with state and local laws and federal requirements applicable to bidding and contract award. 24 C.F.R. § 868.12(a) (1984). Further, the housing authority is required to obtain HUD's approval before awarding a modernization construction contract if the bid amount exceeds the HUD-approved budget or if the housing authority received a single bid. 24 C.F.R. § 868.12(f). Since compliance with federal bidding and contract award requirements is a condition to receipt of CIAP federal financial assistance, we will consider whether the Kansas City Housing Authority's waiver of the bid bond requirement was consistent with federal procurement requirements. For the following reasons, we believe that it was.

This Office has consistently held that in direct federal procurements, where a bid guarantee is required as part of a bid, the failure to provide such a guarantee renders the bid nonresponsive. See Pacific Consolidated Services, Inc., B-204781, Mar. 10, 1982, 82-1 CPD ¶ 223. That failure cannot be waived or excused unless one of several limited exceptions applies. One of these is where only a single bid is received. Federal Acquisition Regulation (FAR) § 28.101-4(a), 48 C.F.R. § 28.101-4); Federal Procurement Regulations 41 C.F.R. § 1-10.103-4 (1984). Further, we have held that where more than one bid is submitted, the failure to submit a guarantee may be waived under this exception if all other bids are nonresponsive or otherwise ineligible for award. See Pacific Consolidated Services, Inc., supra. In

^{1/} We have discontinued using such complaints effective with those filed on or after January 29, 1985. See 50 Fed. Reg. 3978 (1985); The George Sollitt Construction Co., B-218101, Feb. 6, 1985, 85-1 CPD ____.

instances where only one bid remains eligible for award except for a defect in the security required by an invitation to assure that the bidder will accept the award, such defect may be waived without any resulting prejudice to other ineligible bidders, since no "acceptable" bids will be discarded in the process. Liberty Asphalt Corp., B-196451, Jan. 29, 1980, 80-1 CPD ¶ 81.

We find that Ammon's bid falls within the single bid exception because Ed Davis was ineligible for award. A bidder cannot be considered for award on a combination of line items which included an item on which it did not bid. Thus, a bidder that chooses to bid on only some of the line items included in the solicitation is ineligible for an award which includes an item the bidder has chosen to exclude. P & A Construction Co., Inc., B-206243, Feb. 18, 1982, 82-1 CPD ¶ 145.

Here, the protester argues that it should be permitted to add to its bid a price for deductive item No. 6. Correction of a bid after opening, however, is limited to cases where, among other requirements, the party seeking correction intended to bid but made an error in calculating its bid. By entering the words "No Bid" for item No. 6, it appears that Ed Davis made a deliberate decision not to bid on that item. The firm cannot be permitted to bid on that item now, for the first time. Id. Therefore, the omission of a bid guarantee from Ammon's bid may be waived as only that bid was eligible for acceptance in light of the funds available.

In view of the lack of any evidence in the record to support Ed Davis' protest concerning negotiation, we consider the allegation of preferential treatment of the other bidder to be purely speculative, and it will not satisfy the protester's burden of affirmatively proving its case. See Edward E. Davis Contracting, Inc., B-199524, Jan. 13, 1981, 81-1 CPD ¶ 20. We note that the protester apparently believes that negotiation took place because of the description of the contract in the Dodge Reports (a publication of McGraw-Hill, Inc.). Negotiation is not indicated in the record, and this description appears to be erroneous.

B-216353

The complaint is denied.

for *Milton J. Jordan*
Comptroller General
of the United States